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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1970.

## No. 1627

WILLIAM E. DAVERN, JR.,
*Petitioner,*

*vs.*

CIVIL SERVICE COMMISSION OF THE CITY OF CHICAGO, AND ORLANDO W. WILSON, SUPERINTENDENT OF POLICE OF THE CITY OF CHICAGO,
*Respondents.*

ON PETITION FOR WRIT OF CERTIORARI TO SUPREME COURT OF ILLINOIS.

## BRIEF FOR RESPONDENTS IN OPPOSITION.

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THE GUNTHORP-WARREN PRINTING COMPANY, CHICAGO 56

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## BRIEF FOR RESPONDENTS IN OPPOSITION.

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### QUESTIONS PRESENTED FOR REVIEW.

1. Can the petitioner seek a writ of certiorari when he has failed to raise any questions under the Constitution of the United States in the court below?

2. Did the Supreme Court of Illinois properly decide that the manifest weight of the evidence justified the Civil Service Commission in decertifying and removing petitioner's name from the eligible list for the position of patrolman in the Chicago Police Department?

## REASONS FOR DENYING THE WRIT.

**In the court below the petitioner did not draw in question the validity of a state statute on the ground of its being repugnant to the Constitution, treaties or laws of the United States, as required under 28 U. S. C. § 1257 (3).**

Although the petition herein (p. 2) contains the affirmative statement that questions under the United States Constitution were raised in the court below, as required under 28 U. S. C. § 1257(3), the record shows this to be incorrect. The petitioner did not raise any federal constitutional question either before the Supreme Court of Illinois, the Appellate Court of Illinois, First District, the Circuit Court of Cook County, Illinois or the Civil Service Commission.

The only hint of any constitutional issue the petitioner made in the court below was in the Petition for Rehearing filed with the Supreme Court of Illinois after it rendered its decision. On page 5 of the Petition for Rehearing the following appeared: "Not only is this a violation of the court's proper function under the Administrative Review Act, but it involves the court in an unconstitutional function by having it usurp the responsibilities belonging to the executive branch of the Government". On page 6 of the same Petition the following was stated: "It is submitted that this Court cannot sustain an alleged order unsupported by findings or conclusions of fact, and that its present opinion in attempting to supply these findings of fact, unconstitutionally involves this Court in the administrative process."

The statements recited hereinabove from the Petition for Rehearing filed in the Supreme Court of Illinois do not bring the petitioner within this Court's jurisdiction, for the following reasons:

1. Questions under the United States Constitution sought to be reviewed were neither raised timely nor properly in the court below.

2. The suggestions of constitutional issues raised in the Petition for Rehearing to the Supreme Court of Illinois, besides being mentioned after the fact, that is after the court had rendered a decision, were, in addition, at best, a mere inference and did not bring the federal claim to the court's attention with fair precision (*New York ex rel. Bryant* v. *Zimmerman,* 278 U. S. 63, 67).

In *Oxley Stave Co.* v. *Butler County,* 166 U. S. 648, 655, this Court declared:

> ". . . the jurisdiction of this Court to re-examine the final judgment of a state court cannot arise from a mere inference, but only from averments so distinct and positive as to place it beyond question that the party bringing a case here from such court intended to assert a Federal right."

3. In Illinois, as in most states, it is the duty of a person, whenever he regards his constitutional rights as invaded, to raise an objection at the earliest fair opportunity and the failure to do so amounts to a waiver of the right (*Village of Riverside* v. *Kuhne,* 397 Ill. 108, 110 (1947); *Shoal Creek Coal Co.* v. *Ind. Com.,* 300 Ill. 551). The right to raise a federal question is dependent upon the state law (*Michael* v. *Louisiana,* 350 U. S. 91). Since the instant petitioner did not meet the Illinois rule which requires the raising of the issue at the earliest opportunity the petition for certiorari should be denied. Point I of the petition asserts that the Civil Service Commission violated petitioner's rights to due process (Petition, p. 9). As shown herein above, this claim was not even suggested before the Commission, the Appellate Court of Illinois nor before the Supreme Court of Illinois; it is raised for the first time in this Court.

4. The petitioner in an apparent attempt to extricate himself from the position he is in, namely, the failure to raise a constitutional issue below, now argues that the Supreme Court of Illinois unconstitutionally made an independent determination of facts (Petition, p. 17). It is apparent that petitioner has not only misread but has, in addition, misinterpreted the opinion rendered in the Supreme Court of Illinois. The Circuit Court of Cook County decided that the judgment of the Civil Service Commission was against the manifest weight of the evidence. The Appellate Court of Illinois sustained the Circuit Court. The Supreme Court of Illinois, as was it duty and right, reviewed the record and decided (Petition, p. 7a):

> "The appellate and circuit courts incorrectly found the Commission's actions to be against the manifest weight of the evidence. The judgments are accordingly reversed and the cause remanded to the circuit court of Cook County with directions to confirm the Commission's order striking plaintiff's name from the eligible list."

## CONCLUSION.

For the foregoing reasons it is respectfully submitted that the petition for writ of certiorari should be denied.

Respectfully submitted,

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May 11, 1971.